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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 432

BASILIO FUGIANI,
Petitioner,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service, San Francisco District,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

The petitioner, Basilio Fugiani, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the lower Court's dismissal of a petition for review filed in the case of your petitioner.

OPINIONS BELOW.

The decision of the Special Inquiry Officer, Immigration and Naturalization Service (Exhibit 1, Order dated September 25, 1953) is printed in Appendix B, attached hereto, page xvii. The order of the Board of Immigration Appeals (Exhibit 1, Order dated October 5, 1954) is printed in Appendix C, attached hereto, page xxiv. The order of the District Court dismissing said action is printed at pages 12-16 in the record. The opinion of the Court of Appeals for the Ninth Circuit has not yet been officially reported, but is printed in Appendix A, attached hereto, page i.

JURISDICTION.

The judgment of the Court of Appeals was filed and entered on July 11, 1958, Appendix A hereto, page i. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Is an adverse determination of eligibility for suspension of deportation by the Immigration and Naturalization Service subject to judicial review?

2. Can the Courts review, for abuse of discretion, an Immigration and Naturalization Service decision denying suspension of deportation where the administrative record shows that, despite the evidence, the

relief sought is denied upon an erroneous assumption of fact based solely upon speculation and conjecture?

STATUTES INVOLVED.

5 U.S.C. 1009 provides in part:

"(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * * * *

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making

the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. June 11, 1946, c. 324, Sec. 10, 60 Stat. 243."

Section 19(c) of the Immigration Act of 1917 (62 Stat. 1206; 8 U.S.C. 155(c)), as amended, provides in pertinent part as follows:

"In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this act."

The Code of Federal Regulations promulgated under the Immigration Act of 1917, and in effect at the time of the hearing in this matter, provided in part as follows:

8 C.F.R. 151.2 Conduct of Hearings—(1951 Supp.).

(b) Hearing Examiners; general duties. The hearing examiner shall conduct a fair and impartial hearing. He shall not consult with any person or party on any fact in issue unless upon notice and opportunity for all persons concerned to participate * * *.

(c) Hearing Officer; specific duties. * * * The hearing officer shall thereafter present all available evidence, including the interrogation of the alien and all witnesses presented concerning * * *

(4) factors bearing upon statutory eligibility for discretionary relief, * * *.

8 C.F.R. 151.3 Contents of record; evidence—(a) Record.

The transcript of testimony and exhibits, together with all written motions and other papers and requests filed in the proceeding, shall contitute the exclusive record for the recommended decision of the hearing examiner.

8 C.F.R. 151.5 Recommended decision—(a) Preparation by hearing officer of written recommended decision.

* * * the hearing officer shall, as soon as practicable after conclusion of the hearing * * * prepare in writing his recommended decision, signed by him, which shall set forth a summary of the evidence adduced, a ruling upon each of the matters which may be submitted pursuant to Section 151.4, and his proposed findings of fact and conclusions of law as to deportability. If the alien has applied for the privilege of departure in lieu of deportation or for suspension of deportation, the recommended decision shall also contain a separate summary, ruling, proposed findings and

conclusions as to the alien's statutory eligibility under the provisions of section 19(c) of the Immigration Act of 1917, as amended, for such relief. * * *"

Section 405(a) of Public Law 414 (66 Stat. 280), known as the Immigration and Nationality Act of 1952, provided:

"Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any * * * proceeding * * * done or existing at the time this Act shall take effect; but as to all such * * * proceedings * * * the statute * * * repealed by this Act are, unless otherwise specifically provided herein, hereby continued in force and effect, * * *. An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, * * * which is pending on the date of the enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection."

STATEMENT OF THE CASE.

Petitioner is a native and citizen of Italy who was lawfully admitted to the United States on February 22, 1950 as a temporary visitor under Section 3(2) of the Immigration Act of 1924. On March 28, 1950 he married a native-born citizen of the United States. Subsequently, he voluntarily appeared at the Immigration and Naturalization Service, San Francisco, California, and filed an application for discretionary

relief under Section 19(c) of the Immigration Act of 1917, as amended. A warrant of arrest issued on June 25, 1951 charging that, under Sections 14 and 15 of the Immigration Act of 1924, petitioner was deportable on the grounds that he had remained in the United States for a longer period of time than permitted by law or regulations promulgated thereunder. On September 23, 1952, he was accorded a hearing. The Hearing Officer denied petitioner's application for suspension of deportation but granted him the privilege of voluntary departure from the United States. The following day, September 24, 1952, the Hearing Officer reopened the proceeding and granted petitioner the additional privilege of preexamination. In an order dated July 28, 1953 the prior order of September 24, 1952 was withdrawn and the proceedings reopened. Said order is printed and attached hereto as Appendix D, page xxvii. In a decision dated September 25, 1953, the Special Inquiry Officer concluded "that the (petitioner) is wholly ineligible for any type of discretionary relief". (Appendix B, page xvii.) In a decision dated October 5, 1954, the Board of Immigration Appeals reached the conclusion that the decision of the Special Inquiry Officer should not be disturbed. (Appendix C, page xxiv.) The District Court concluded "under all of the circumstances disclosed in the record, judicial intervention is not warranted". (R. 12.) By a split decision, the Court of Appeals for the Ninth Circuit affirmed—Circuit Judges Bone and Fee concurring in the result in separate decisions, with Circuit Judge Pope dissenting.

REASONS FOR GRANTING CERTIORARI.

This writ of certiorari is sought because the issues presented herein raise important questions of federal pleading and practice as well as important questions pertaining to the administration of the immigration and nationality laws of the United States. In addition, the decision below is in conflict with decisions of this Court as handed down in other cases.

1. The decision below is in direct conflict with the decision of this Court in the case of *McGrath v. Kristensen*, 340 U.S. 162, 169-171.

As was stated by Judge Pope in his dissenting opinion:

> "Indeed, the whole matter was reopened for the sole purpose of passing upon appellant's *eligibility*. The order read: 'It is further ordered that the proceedings be reopened in order to determine the respondent's *eligibility for discretionary relief* in view of new and important evidence now contained in the file.' (Emphasis mine) The Board of Immigration Appeals so read the decision when they affirmed it. Reference to their decision shows that they treated the Special Officer's opinion as the real decision.[1]
>
> Thus it is apparent that this case precisely parallels the Kristensen case, supra. There the question decided by the Attorney General was that the

[1] Interestingly, the majority opinion contains statements consistent with my view of what was decided. Says the majority (10th paragraph of the opinion): ". . . the only issues determined by the Special Inquiry Officer during the administrative hearings in this case were the issues of appellant's deportability and eligibility for discretionary relief. . . ."

alien was *ineligible* for discretionary relief because he was not eligible for naturalization.[2] The Court said:

> 'Where an official's authority to act depends upon the status of the person affected, in this case eligibility for citizenship, that status, when in dispute, may be determined by a declaratory judgment proceeding after the exhaustion of administrative remedies. Under Sec. 19(c) of the Immigration Act the exercise of the Attorney General's discretion in suspending deportation is prohibited in the case of aliens ineligible for citizenship. This is an actual controversy between the alien and immigration officials over the legal right of the alien to be considered for suspension. As such a controversy over federal laws, it is within the jurisdiction of federal courts, 28 U.S.C. 133, and the terms of the Declaratory Judgment Act, 28 U.S.C. 2201.'

If we substitute in the above quotation the words 'eligibility for discretionary relief' for the words 'eligibility for citizenship', we have this case precisely. Such a determination of status is reviewable for the reasons stated in Brownell v. Tom We Shung, 352 U.S. 180, 185: 'Exemptions from the . . . Administrative Procedure Act are not lightly to be presumed,' Marcello v. Bonds, 349 U.S. 302, 310 (1955), and unless made by clear

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[2] "Review was granted by this Court to determine whether the Attorney General was justified in refusing to suspend deportation of an alien under Sec. 19(c) as amended, 62 Stat. 1206, of the Immigration Act of 1917, 39 Stat. 874, 889, 8 U.S.C. Secs. 101, 155(c), on the sole ground that the alien was ineligible for naturalization." 340 U.S. p. 163.

language or supersedure the expanded mode of review granted by that Act cannot be modified."

Cf. *Ceballos v. Shaughnessy,* 352 U.S. 599 (1957);

Dessalernos v. Savoretti, 356 U.S. 269 (1958).

The Immigration and Naturalization Service applied erroneous legal standards in deciding that this petitioner was ineligible for any discretionary relief. Where the eligibility of an alien for suspension of deportation depends upon the status of that alien, and where the question concerning his status is in dispute, the Courts may intervene for the purpose of determinining whether such individual meets the statutory standards provided by the appropriate Act.

The decision of the majority of the Court of Appeals, holding that an administrative finding of ineligibility for a statutory relief is an administrative discretion not subject to judicial review, presents an important question which should be determined by this Court.

2. The decision of the Court of Appeals, holding that the administrative authorities have an absolute, unbridled discretion, not subject to judicial review, involves an important question of federal law which appears to be in conflict with other decisions of this Court.

Citing *United States ex rel. Hintopoulos v. Shaughnessy,* 353 U.S. 72 (1957) Judge Bone in his opinion stated:

"Whether a deportable alien is to be permitted voluntarily to depart the United States, or

> whether deportation is to be suspended, is a matter within the discretion of the Attorney General. * * * This Court may not interfere with exercise of that discretion."

However, this Court in the *Hintopoulos* case, supra, at page 77, stated:

> "Nor can we say that it was abuse of discretion to withhold relief in this case."

It would appear from this statement that in certain instances the Courts are not without power to review exercise of an administrative discretion where there has been an abuse.

An alien within the United States may be expelled only after proceedings conforming to the traditional standards of fairness encompassed in due process of law.

> *Japanese Immigrant Case* (Yamataya v. Fisher), 189 U.S. 86, 100, 101 (1903);
> *Wong Yang Sung v. McGrath,* 339 U.S. 33, 49, 50 (1950);
> *Kwong Hai Chew v. Colding,* 344 U.S. 590, 598 (1953);
> *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206, 212 (1953).

Judicial review is appropriate where administrative officials are guilty of abuse of discretion.

> *Low Wah Suey v. Backus,* 225 U.S. 460, 468 (1912);
> *Kwock Jan Fat v. White,* 253 U.S. 454, 464 (1920);
> *Carlson v. Landon,* 342 U.S. 524, 537 (1952).

Even though the granting of a discretionary relief, such as suspension of deportation, is not a matter of right but is a matter of grace, the administrative officials can not resort to speculation and conjecture without considering the evidence when exercising this delegated executive power. Any exercise of discretion must be consistent "with the fundamental principles of justice embraced within the conception of due process of law".

Tang Tun v. Edsell, 223 U.S. 673 (1912);
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1950);
Carlson v. Landon, 342 U.S. 524 (1952).

In the dissenting opinion, Judge Pope stated:

> "Out of the blue sky, and, it seems to me, without basis, the hearing officer pulled a finding that his story was incredible." (Appendix A, page i.)

Judge Bone also made a comment of a similar nature by way of footnote (Appendix A, page i), when he stated:

> "The Special Inquiry Officer found appellant's assertions of fact as to the alleged Berl marriage 'incredible' despite the fact that during the hearing appellant communicated by means of an interpreter so that the usual means of evaluating credibility were not available to the Special Inquiry Officer, despite the fact (as the Italian Court observed) that life in Berlin in the summer of 1945 was grim to an extreme, despite the fact that the Italian Court found the facts as told by appellant credible, and despite the fact that there was no evidence introduced that conflicted

with appellant's statement of the events in Berlin."

Discretion, as a minimum, requires exercise of the authority in a reasonable manner. And where the administrative decision is without reasonable foundation, in order to prevent miscarriage of justice, the Courts should exercise their inherent power and protect the rights of individuals as expressed in the due process of law clause of the Constitution of the United States.

Section 10 of the Administrative Procedures Act imposed on the Court a duty to hold unlawful and set aside agency actions, findings and conclusions found to be unsupported by substantial evidence. 60 Stat. 243, 5 U.S.C.A. 1009 (Cum. Supp. 1950).

To prevent abuse of extraordinary power granted to the Immigration and Naturalization Service, the legality of such administrative determinations must be subject to judicial review in appropriate cases. The decision of the Court below, even after commenting that the decision is contrary to the evidence, concludes that the Courts may not, under any set of facts, review an exercise of administrative discretion by the Immigration and Naturalization Service.

CONCLUSIONS

It is respectfully submitted that the administrative determination that this petitioner was ineligible for the discretionary relief sought is subject to judicial review. Likewise, we do not believe that the immigra-

tion and nationality laws of the United States contemplate or authorize an administrative decision, including exercise of discretion, based on nothing more than inference, speculation and conjecture. Due process of law requires that such determinations be based upon reasonable, substantial and probative evidence. It is the inescapable duty of the Courts, as free and responsible moral agents of this country, to use everything within their power to force administrative compliance with the mandates of the Constitution of the United States.

For the reasons set forth, it is respectfully submitted that this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
October 6, 1958.

JOSEPH S. HERTOGS,
Attorney for Petitioner.

(Appendices A, B, C and D Follow.)

Appendix A

United States Court of Appeals
for the Ninth Circuit

BASILIO FUGIANI, *Appellant,* vs. BRUCE G. BARBER, District Director, Immigration and Naturalization Service, San Francisco, California, *Appellee.*	No. 15,162 July 11, 1958

Appeal from the United States District Court for the
Northern District of California
Southern Division

Before: BONE, POPE and FEE, Circuit Judges

BONE, Circuit Judge.

Fugiani appeals from an order of the District Court dismissing his petition for review. Appellant is a native and citizen of Italy. He was admitted at New York to the United States as a non-immigrant (visitor) under Section 3(2) of the Immigration Act of 1924. On March 28, 1950, appellant married a citizen of the United States. On June 25, 1951, a warrant of arrest was issued charging that appellant was in the United States in violation of law in that after his admission as a visitor he had remained in the United

States for a longer time than permitted under the law[1] or regulations made thereunder.

A hearing was conducted on September 23, 1952, before a Special Inquiry Officer attached to the San Francisco district office of the Immigration and Naturalization Service. Appellant applied for suspension of deportation and, as an alternative form of relief, voluntary departure from the United States. At the conclusion of the hearing the Special Inquiry Officer found appellant eligible for voluntary departure from the United States.[2]

On September 24, 1952, the hearing was reopened and the Special Inquiry Officer entered an order granting the appellant the additional privilege of preexamination.[3] No appeal was taken from this order

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[1]Section 14 of the Immigration Act of 1924, 8 U.S.C.A. §214: "Any alien who at any time after entering the United States is found • • • to have remained therein for a longer time than permitted under this chapter or regulations made thereunder, shall be taken into custody and deported in the same manner as provided for in sections 155 and 156 of this title • • •."

[2]Section 19(c) of the Immigration Act of 1917, 8 U.S.C.A. §155(c): "in the case of any alien • • • who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney-General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation, or (2) suspend deportation of such alien if not racially inadmissible or ineligible to naturalization in the United States if he finds that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent or minor child of such deportable alien. • • •"

[3]8 C.F.R. §142 provides for preexamination of an alien "• • • for the purpose of determining in advance his admissibility into the United States for permanent residence when in possession of an unexpired immigration visa: • • •" 8 C.F.R. §142.1.

8 C.F.R. §142.2. "Preexamination shall not be authorized unless it appears to the officer granting such authorization that the

and a formal order granting voluntary departure and pre-examination was filed on September 28, 1952.

A visa petition was submitted for appellant by his wife; it was approved by the San Francisco District Office. By letter dated November 25, 1952, the United States Consulate General at Vancouver, British Columbia, notified the appellant that no further action would be taken in his case until he submitted documentary evidence of the termination of a prior marriage in Germany to a German girl.

Appellant communicated with his sister residing in his native city of Fabriano, Province of Ancona, Italy. She informed appellant that by the official records of the Township of Fabriano appellant was married in Berlin, Germany, in 1945, and a record of the marriage was forwarded to Fabriano, Italy, on March 20, 1950, by the Foreign Ministry at Rome. From the briefs submitted it would seem that in Italy one's birth record is annotated or amended to show marriage, and that his birth record did not show any marriage at the time he entered the United States on February 22, 1950. Appellant commenced proceedings in Italy to annul this claimed marriage.[4]

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alien is: (a) Admissible to Canada; (b) Of good moral character; • • • (d) Able to obtain the prompt issuance of an immigration visa in case it is determined that he is admissible to the United States for permanent residence."

8 C.F.R. §142.7. "• • • preexamination will not be accorded • • • unless or until he • • • has received from the consular officer written assurance • • • that a visa will be promptly available • • •."

[4]Acting on instructions from appellant, an attorney in Fabriano, Italy, began an annulment action. The matter came to trial in an appropriate court in Ancona, June 27, 1953. The person

On July 29, 1953, a Special Inquiry Officer of the Immigration and Naturalization Service in San Francisco entered an order that the deportation proceedings of appellant be reopened and that the prior order granting voluntary departure with the additional privilege of preexamination be withdrawn. Hearing was held, at which appellant presented in evidence a decree of annulment entered in the Civil and Penal Tribunal of Ancona, Italy, on July 10, 1953, showing the termination of his marriage to one Elly Martha Porg, contracted on September 4, 1945, in Berlin. Appellant stated the facts to be that he was given shelter by the family of Elly Porg after his escape from a German prisoner of war camp, that he did not speak German, that he did not intend to contract marriage, and believed he was signing documents which would permit the Porg family to obtain food and clothing rations. The Special Inquiry Officer found this to be "incredible," and decided that the appellant was ineligible for discretionary relief.[5] The

identified as Elly Martha Porg appeared and testified about the alleged marriage. A decree annulling the marriage was entered on June 27, 1953. Recitals contained in the decree show that the testimony of Elly Porg was to the effect that appellant was tricked and deceived into marriage on the pretext that he was signing papers to obtain food. At the time appellant had but recently escaped from a German prisoner of war camp, did not speak German, and was in hiding in Berlin, awaiting the opportunity to cross from the Soviet sector in Berlin into the American sector so that he might return to Italy.

[5]The Special Inquiry Officer found appellant's assertions of fact as to the alleged Berlin marriage "incredible" despite the fact that during the hearing appellant communicated by means of an interpreter so that the usual means of evaluating credibility were not available to the Special Inquiry Officer, despite the fact (as the Italian Court observed) that life in Berlin in the summer of 1945 was grim to an extreme, despite the fact that the Italian Court

appellant was ordered deported. On October 5, 1954, the Board of Immigration Appeals dismissed an appeal from this order of deportation.

Appellant later petitioned the United States District Court for a review of the administrative proceeding, under 5 U.S.C.A. §1009, Section 10 of the Administrative Procedure Act. The petition alleged that appellant is and has been a person of good moral character, that he has resided in the United States with his United States citizen spouse continuously since their marriage on March 28, 1950, that appellant did not willfully conceal any prior existing marriage, that he had no knowledge of the alleged prior marriage, that the expressed opinions of the Special Inquiry Officer are contrary to the findings and conclusions of the Italian Court which granted a decree of annulment on the ground of fraud and concealment, that the decision is arbitrary, capricious and contrary to the evidence of record, that the decision is an abuse of discretion, and contrary to the record, and that "* * * if the charges of the Special Inquiry Officer are permitted to stand, the plaintiff [appellant] will be forever barred from readmission to the United States; * * *." The District Judge dismissed the petition on the ground that "* * * Under all the circumstances disclosed in the record, judicial intervention is not warranted." The instant appeal followed.

Appellant presents three specifications of error which deal with (1) sufficiency of the evidence; (2)

found the facts as told by appellant credible, and despite the fact that there was no evidence introduced that conflicted with appellant's statement of the events in Berlin.

fairness of the administrative hearing; and (3) refusal of the District Court to intervene.

We find no lack of fairness in the administrative proceedings in this case. We believe that the other alleged errors, if they are errors, are not errors that this Court can remedy. By appellant's own pleading he remained in the United States for a period of time in excess of that allowed by his visa, and for that reason he is deportable. Immigration Act of 1924, §14, 8 U.S.C.A. §214. Whether a deportable alien is to be permitted voluntarily to depart the United States, or whether deportation is to be suspended, is a matter within the discretion of the Attorney General. Immigration Act of 1917, §19(c), 8 U.S.C.A. §155(c). This Court may not interfere with exercise of that discretion. United States ex rel. Von Kleczkowski et al. v. Watkins, S.D. N.Y., 1947, 71 F. Supp. 429, 435; United States ex rel. Hintopoulos v. Shaughnessy, 353 U.S. 72, 1957.

Despite the comments of the Special Inquiry Officer in his "discussion"[6] of the case, we believe that the only issues before and the only issues determined by the Special Inquiry Officer during the administrative hearings in this case were the issues of appellant's

[6]The "discussion" by the Special Inquiry Officer includes these comments: "The record in this case clearly indicates that the respondent attempted to obtain an immigration visa for admission to this country through fraud and that he carefully concealed from the authorities that he had been previously married • • •. I believe that this respondent was fully aware of his prior marriage and deliberately withheld such information from the authorities of this country even to the extent of committing perjury in his application for discretionary relief. This respondent has shown an utter disregard for the Immigration Laws of this country • • •."

deportability *and* eligibility for discretionary relief in the nature of voluntary departure from the United States. We are supported in the view that the Special Inquiry Officer was not determining the status of appellant to reenter the United States by the findings and conclusions made at the close of the reopened hearing. From these findings and conclusions, it is clear that the Special Inquiry Officer found appellant deportable by reason of over-staying the time limit in his visa, and made no determination as to his eligibility for reentry into the United States. Eligibility for reentry will be determined if and when appellant seeks reentry.

Appellant devotes a large part of his brief in this appeal to the argument that the judicial determination of the Italian Court that the appellant was deceived and had no knowledge of such marriage should be binding upon the administrative tribunals in this case. Cogent as this argument may be in the appropriate factual situation, we believe it is not material here. The issue before the Immigration authorities was not deception into and knowledge of the marriage but whether to permit *an admittedly deportable alien* to depart voluntarily from the United States, a matter wholly within the discretion of the Attorney General. Immigration Act of 1917, §19(c), 8 U.S.C.A. §155(c).

The judgment of the District Court is affirmed.

JAMES ALGER FEE, Circuit Judge; concurring:

There is too much ado about this foreigner who deliberately injected himself into this country in conscious violation of our law, married within a month, apparently to fend off deportation, and has maintained himself here in defiance of our government for almost five years.

Admittedly, he has been subject to lawful deportation during all this time, and is now. He has been consistently accorded due process of law. At his deportation hearing, the basis was found unquestioned for immediate action. He was granted suspension for a limited period in order to permit him to depart voluntarily[1] and to have pre-examination for readmission.[2] He has not departed voluntarily, and the time so limited, with all extensions, expired on July 20, 1953.

The reason Fugiani has not voluntarily departed in order to obtain permanent residence here is that, if he should leave, he could not get back. Pre-examination has not been had because a condition precedent to pre-examination is that he "has received from the consular officer written assurance * * * that a visa will be promptly available."[3] It is perfectly clear that the United States Consul at Vancouver, British Columbia, Canada, will not now issue such a visa promptly or at all.

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[1] 8 C.F.R. § 150.3 (1951 Supp.).
[2] 8 C.F.R. § 150.3(c) (1951 Supp.).
[3] 8 C.F.R. § 142.7(a) (1951 Supp.).

The position of Fugiani is that the authorities of this country must accept his story and the decree of an Italian court, which he obtained ex parte, and admit him. But this is only a theory in which there are none of the constitutional points suggested.

The authorities acted strictly according to regulations in reopening the proceedings to determine the proper exercise of discretionary relief.[4]

It was of no consequence what issues or questions the Special Inquiry Officer considered at the hearing. That official had the responsibility, in deciding whether the privilege of pre-examination would again be granted, to determine whether or not the applicant was of good moral character[5] and whether the latter could receive assurance from the consulate in Canada that an immigration visa would issue promptly when the alien presented himself there.[6] He determined these questions against Fugiani.

This alien is here in violation of our law. He was accorded the privilege of voluntary departure and pre-examination, which was discretionary. The limitation on this order allowing voluntary departure has long since expired. The officials reopened the hearing and denied further discretionary relief and ordered him deported in accordance with regulation.

If this was not lawful procedure, an impasse has been created. Fugiani, however undesirable, will be a

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[4]The effective regulations pursuant to which the hearing was reopened were 8 C.F.R. §§ 151.6, 151.7, 151.5(e) (1951 Supp.) and also 8 C.F.R. § 150.3(a) (1951 Supp.).

[5]8 C.F.R. § 142.2(b) (1949 ed.).

[6]8 C.F.R. § 142.2(d) (1949 ed.).

permanent resident of the United States. This result does not seem possible.

In passing upon the issue of good moral character pursuant to his jurisdiction under the statute and regulation, the Special Hearing Officer had a right to consider the fact that Fugiani had once gone through a form of marriage to get bread and that he failed to reveal that fact to the immigration officers. It was pertinent to consider that Fugiani married in haste while unlawfully in this country. This is a well known device. Both these circumstances could properly have been considered in determining whether to allow the pre-examination on a discretionary basis.

In the event that the Hearing Officer incidentally considered matters which might affect the right of the alien to re-enter, the answer is he necessarily entertained the two vital questions under the statute and regulations.

POPE, Circuit Judge, dissenting.

I do not see how this decision can stand in the face of McGrath v. Kristensen, 340 U.S. 162, 169-171. I think the majority opinion fails to note just what it was that the Special Inquiry Officer and the Board of Immigration Appeals determined. The Special Inquiry Officer never got around to consider whether the discretionary power would or would not be exercised. Rather, his decision was that appellant was *ineligible* for suspension or voluntary departure, as a person not of good moral character. The Special Inquiry Offi-

cer's formal findings, labeled as such, refer to nothing but appellant's deportability. They do not even mention discretionary relief. If those findings were the only ones made here the decision would have to be set aside for failure to pass upon the question before the Special Inquiry Officer, namely, whether suspension or voluntary departure should be granted. To make the officer's decision meaningful, it must be read as a whole, including the opinion, where he said: "In view of all the facts and circumstances, I can only conclude that the respondent is wholly *ineligible* for any type of discretionary relief and should be deported and shall so order." (Emphasis mine)

Indeed, the whole matter was reopened for the sole purpose of passing upon appellant's *eligibility*. The order read: "It is further ordered that the proceedings be reopened in order to determine the respondent's *eligibility for discretionary relief* in view of new and important evidence now contained in the file." (Emphasis mine) The Board of Immigration Appeals so read the decision when they affirmed it. Reference to their decision shows that they treated the Special Officer's opinion as the real decision.[1]

Thus it is apparent that this case precisely parallels the Kristensen case, supra. There the question decided by the Attorney General was that the alien was *ineligible* for discretionary relief because he was not

[1]Interestingly, the majority opinion contains statements consistent with my view of what was decided. Says the majority, (10th paragraph of the opinion): ". . . the only issues determined by the Special Inquiry officer during the administrative hearings in this case were the issues of appellant's deportability *and* eligibility for discretionary relief. . . ."

eligible for naturalization.[2] The Court said: "Where an official's authority to act depends upon the status of the person affected, in this case eligibility for citizenship, that status, when in dispute, may be determined by a declaratory judgment proceeding after the exhaustion of administrative remedies. Under Sec. 19 (c) of the Immigration Act the exercise of the Attorney General's appropriate discretion in suspending deportation is prohibited in the case of aliens ineligible for citizenship. The alien is determined to have a proscribed status by this administrative ruling of ineligibility. Since the administrative determination is final, the alien can remove the bar to consideration of suspension only by a judicial determination of his eligibility for citizenship. This is an actual controversy between the alien and immigration officials over the legal right of the alien to be considered for suspension. As such a controversy over federal laws, it is within the jurisdiction of federal courts, 28 U.S.C. 1331, and the terms of the Declaratory Judgment Act, 28 U.S.C. 2201."

If we substitute in the above quotation the words "eligibility for discretionary relief" for the words "eligibility for citizenship", we have this case precisely. Such a determination of status is reviewable for the reasons stated in Brownell v. Tom We Shung, 352

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[2] "Review was granted by this Court to determine whether the Attorney General was justified in refusing to suspend deportation of an alien under Sec. 19(c) as amended, 62 Stat. 1206, of the Immigration Act of 1917, 39 Stat. 874, 889, 8 U.S.C. Secs. 101, 155(c), on the sole ground that the alien was ineligible for naturalization." 340 U.S. p. 163.

U.S. 180, 185: " 'Exemptions from the . . . Administrative Procedure Act are not lightly to be presumed,' Marcello v. Bonds, 349 U.S. 302, 310 (1955), and unless made by clear language or supersedure the expanded mode of review granted by that Act cannot be modified."

It is manifest from the record here that there is plenty of room for different fact conclusions upon a review of the officer's decision. The explanation which the appellant gave for his ignorance of the marriage record was entirely understandable and it is confirmed by everything else in the record including the decree of the Italian court which in turn was based upon a confirmation of his story by the woman, Elly Porg, who appeared before that court to corroborate the appellant's account that the signature on the document which turned out to be a marriage contract and which was written in German which he did not understand, had been affixed by him with the understanding that it was an application for additional food rations. Out of the blue sky, and, it seems to me, without basis, the hearing officer pulled a finding that his story was incredible.

Personally, I would doubt that a trial judge on a review of this order would find the appellant's story incredible. More fantastic experiences of escaping soldiers during the late war have been checked and verified. At any rate, the purpose of the provision for review is to subject fact determinations as important as this one to review by a judge. That is what the Administrative Procedure Act is for.

I think the case should be remanded to the court below for the purpose of giving appellant the review of this finding to which he is entitled. If the trial court then finds appellant not ineligible for voluntary departure, the determination of ineligibility must be set aside. As in the case of United States ex rel. Zacharias v. Shaughnessy, 2 cir., 221 F. 2d 578, since appellant had initiated these proceedings, even before the 1952 Act, he would then be entitled to a new hearing for the exercise of discretion by the Board of Immigration Appeals.

I agree with what Judge Byrne said in Acosta v. Landon, 125 F. Supp. 434, 441: "In other words, according to the Board, whenever an alien is found to be deportable, suspension of deportation should not be granted if at his hearing the alien gave testimony contrary to what the administrative officials found to be true. The reasoning apparently is that a witness whose testimony is not accepted by the trier of fact is a perjurer and not a person of good moral character. Such reasoning is not only legally invalid, but it is contrary to the basic sense of fairness upon which our legal system is founded.

* * *

"The courts may not suspend the deportation of a deportable alien as that discretionary power is vested solely in the Attorney General, 8 U.S.C.A. 1254. However, when the Attorney General is required as a condition precedent to an order of deportation to exercise his discretion with respect to the suspension of deportation, the validity of the order must rest upon

the needed exercise of discretion. If it is lacking, the order is ineffective."[3]

That case is interesting for another reason. It is an illustration of the manner in which district courts, reviewing orders of administrative bodies, properly reject the latters' findings when the court is satisfied that they are "unsupported by substantial evidence" within the meaning of Sec. 10 (e) of the Administrative Procedure Act (Title 5 Sec. 1009 (e)).

Another case where a district judge substituted his own judgment on the facts was Bonica v. Olesen, 126 F. Supp. 398. Cf. Securities and Exchange Commission v. Cogan, 9 cir., 201 F. 2d 78, 86: "[W]e think it manifest that the district judge knew more about the subject in hand than did the Commission." See also,

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[3]Said Judge Byrne: "It is difficult to understand how the inquiry officer could find that the deportation of this alien . . . would not result in exceptional and extremely unusual hardship." (In Mar Gong v. Brownell, 9 cir., 209 F. 2d 448, 452, are listed cases in which this court under earlier acts has rejected fact findings of immigration authorities as "purely arbitrary.")

Indeed, if what Judge Byrne said is valid, then even if the Special Inquiry Officer had purported to exercise a discretion to deny voluntary departure, (I have shown he did not), a reviewing court could well conclude that a discretion exercised on these grounds was an arbitrary one,—an abuse of discretion. The suggestion of the majority that a court may never interfere with the exercise of discretion by the Attorney General is not good law. Thus in Wolf v. Boyd, 9 cir., 238 F. 2d 249, 254, 257, this court expressly recognized the power of a court to review even discretionary orders "when there has been a clear abuse of discretion", or where "the denial of discretionary relief was arbitrary". So, in Hintopoulos v. Shaughnessy, 353 U.S. 72, the court recognized this exceptional case when it said "Nor can we say that it was abuse of discretion to withhold relief in this case. . . ."

If discretion had been exercised here, I would hold it arbitrary, and an abuse of discretion for the reasons stated by Judge Byrne. Such a decision is not called for here, for no discretion was ever exercised.

Jaffe, "Judicial Review: Questions of Fact," 69 Harv. L. Rev. 1020, at 1032: "It would seem that the purpose of the 'whole record' test is to limit the opportunity for transmuting a preconception into judgment by picking and choosing what will support that preconception and willfully ignoring whatever weighs against it. Thus, even on a credibility issue we should probably not tolerate the intuitive 'hunch' where the record evidence overwhelmingly points to the contrary. The 'hunch' may of course be honest and it may be right. But it may equally mask the sheer determination to find a certain way, and thus substitute the will of a man for the 'reason' of law."

Deportation is serious business. It may result in the loss "of all that makes life worth living." Bridges v. Wixon, 326 U.S. 135, 147. And the man entitled to have a review in court should not be denied it.

(Endorsed:) Opinion, Concurring Opinion and Dissenting Opinion. Filed July 11, 1958.

Paul P. O'Brien, Clerk.'

Appendix B

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service
San Francisco, California

Sept 25, 1953

File: V-944377
In re: Basilio Fugiani
In Deportation Proceedings
In Behalf of Respondent:
Z. B. Jackson, Attorney at Law
580 Washington Street
San Francisco, California

Charges:
Warrant: Act of 1924—Remained longer—visitor
Lodged: None.

Application: Suspension of deportation and voluntary departure in the alternative.

Detention Status: Released on conditional parole.
Warrant of arrest served: June 25, 1951.

Discussion: This record relates to a 28 year old married male, a native and citizen of Italy who last entered the United States at the port of New York as a passenger on the motor ship "Sobieski" at which time he was admitted by a Board of Special Inquiry as a temporary visitor under bond to June 1, 1950. That entry has been verified. The period of admission was not extended and the respondent has remained in the United States since June 1, 1950 with-

out authority. He is therefore deportable under the Immigration Act of 1924 on the charge stated in the warrant of arrest which is fully sustained.

This matter first came up for hearing under the warrant of arrest on Sept. 23, 1952 at which time the respondent applied for suspension of deportation with an alternative application for voluntary departure in the event he was found ineligible for the maximum relief requested. As evidence of his eligibility for discretionary relief, the respondent presented Immigration Form I 256A which was executed by him before the Deportation Examiner presiding at this hearing on Sep. 23, 1952 (Exhibit 3).

The respondent executed the jurat at the end of Exhibit 3 under oath that the contents of the application were true to the best of his knowledge and belief including certain corrections marked 1 to 6 were made by him or at his request. In this application form the respondent testified among other things that his deportation would result in serious economic detriment to his United States citizen spouse to whom he was married in San Francisco on March 28, 1950.

He also testified that he had not been previously married. At the conclusion of the proceedings on Sept. 23, 1952, the Hearing Officer found the respondent eligible solely for voluntary departure and entered an order granting such relief with an alternative order of deportation. On the following day, the proceedings were reopened by the Hearing Officer on his own motion at which time the respondent advised that he had just received information from the Amer-

ican Consul in Vancouver that he might readily obtain an immigration visa at that Consulate, and in addition to the relief already granted applied for preexamination. At the conclusion of that proceeding, the Hearing Officer found the alien deportable on the charge contained in the warrant of arrest and entered an order granting voluntary departure together with the additional privilege of preexamination with an alternative order of deportation. The respondent was formally advised as to the authorization for preexamination on Oct. 7, 1952 and advised that such authorization would terminate on Dec. 23, 1952. He received several extensions of the time within which he was to depart under the order granting voluntary departure; the last of which expired on July 20, 1953 with notice that that was the final extension and no further time would be granted. In the meantime, the respondent's wife filed a visa petition in his behalf which was approved and later found its way to the American Consul at Vancouver in the usual course of events. Under date of June 23, 1953, this office received a communication from the Central Office of the Immigration and Naturalization Service containing information that this respondent had been previously married and that he had presented no evidence to the American Consulate in Vancouver that his prior marriage had been terminated. The respondent admits having received a letter from the United States Consul General at Vancouver, B.C., Canada dated November 25, 1952 through his advisor, Mr. J. S. Forte, 57 Columbus Avenue, San Francisco 11, California which is quoted in part as follows:

"In further reference to the case of Mr. Fugiani, it is noted that in his preliminary application he stated that he has not been married previously; and in her petition for her husband's preference status, Mrs. Ida Maria Artigiani Fugiani also stated that her husband has not been previously married. Information on file at this office indicates that Mr. Fugiani was previously married to a German girl while he was a prisoner of war in Germany. Before the Consulate General could take further action in Mr. Fugiani's case, it will be necessary for him to submit documentary evidence of the termination of this previous marriage."

A copy of that communication was forwarded to this office. The respondent then through Counsel requested additional time within which to depart in order to enable him to complete an annulment action.

In view of the above developments, the case was reassigned to a Special Inquiry Officer for appropriate attention and was thereafter ordered reopened for the taking of additional evidence as to the respondent's eligibility for discretionary relief.

At the reopened proceedings the respondent presented a decree of annulment entered in the Civil and Penal Tribunal of Ancona, Italy on the 10th day of July, 1953 showing the termination of his marriage to one Elly Martha Porg residing in Berlin—Kochkausstrasse N. 33 was contracted on Sept. 4, 1945 in the City of Berlin. In the action for annulment, the respondent alleged through Counsel that after having escaped from a prisoner of war camp in or near Ber-

lin, Germany, in 1945, he was given shelter by the family of Elly Porg for approximately 15 days. And, on that occasion, he was asked and he did affix his signature in the presence of third parties on a sheet of paper for the purpose, as he was told, to let the Porg family obtain food rations and clothing since they were his hosts and went on to state that he never intended to contract matrimony with the said Elly and that the marriage had never been consummated. It is also noted that in the decree of annulment that mention is made of the fact that Elly Porg appeared through her constituted attorney which is followed by another statement, "Being she was present however in person" at the proceedings and is alleged to have been questioned.

The record in this case clearly indicates that the respondent attempted to obtain an immigration visa for admission to this country through fraud and that he carefully concealed from the authorities that he had been previously married. His statement to the effect that he went through a marriage ceremony and signed papers in Berlin in the belief that the proceedings related only to rationing is incredible. It is indicated that he was in company of several other escaped Italian war prisoners who also signed papers concerning rationing and they certainly did not all go through the same procedure. It might be observed here that Germany for many years has maintained excellent records of vital statistics, and it is inconceivable that an alien however unfamiliar with the German language in possession of all of his faculties could

actually go through a marriage ceremony without being conscious of the fact. It appears that he and the other Italian prisoners were able to make themselves understood by the Porg family who evidently spoke only German and in the event they were able to explain to this respondent that they needed his signature for additional food and clothing, it naturally follows that he should have been able to understand that a marriage was involved. I believe that this respondent was fully aware of his prior marriage and deliberately withheld such information from the authorities of this country even to the extent of committing perjury in his application for discretionary relief. This respondent has shown an utter disregard for the Immigration laws of this country. After being admitted under bond for a short period of time and being denied an extension of stay, he deliberately violated the status of his admission and the bond was breached. It is noted that the date of his marriage to the American citizen was contracted exactly one month after the date of his admission. The conclusion is justified that he was never a bona fide visitor and that his intentions in the first instance were to remain in the United States at all costs. In view of all the facts and circumstances, I can only conclude that the respondent is wholly ineligible for any type of discretionary relief and should be deported and shall so order.

FINDINGS OF FACT:

Upon the basis of all the evidence presented, it is found:

(1) That the respondent is an alien, a native and citizen of Italy;

(2) That the respondent last entered the United States on February 22, 1950 at New York, New York as a passenger on the MS Sobiesky at which time he was admitted as a visitor to June 1, 1950;

(3) That the period of admission was not extended;

(4) That the respondent has remained in the United States for longer than the period for which he was admitted.

CONCLUSION OF LAW:

Upon the basis of the foregoing findings of fact, it is concluded:

(1) That under Sections 14 and 15 of the Immigration Act of May 26, 1924, the respondent is subject to deportation on the ground that after admission as a visitor, he has remained in the United States for a longer period than permitted under said Act or regulations made thereunder.

ORDER: It is ordered that the alien be deported from the United States in the manner provided by law on the charge contained in the warrant of arrest.

/s/ P. R. McLaughlin
P. R. McLaughlin
Special Inquiry Officer

PRM;as

Appendix C

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

OCT 5—1954

File: V-944377—San Francisco
In re: Basilio Fugiani
In Deportation Proceedings
In Behalf of Respondent:

Z. B. Jackson, Esquire
580 Washington Street
San Francisco, California
(Brief filed)

CHARGES:

Warrant: Act of 1924—Remained Longer—Visitor

Lodged: None

APPLICATION: Voluntary departure and prex-amination

DETENTION STATUS: Released on conditional parole

The case comes forward on appeal from the order of a special inquiry officer dated September 25, 1953 directing that the respondent be deported on the charge stated in the warrant of arrest.

The record relates to a native and citizen of Italy, 39 years old, male, who last entered the United States at the port of New York on February 28, 1950 and was admitted as a temporary visitor to June 1, 1950. It is conceded that he is subject to deportation on the

charge stated in the warrant of arrest. The only issue before us is the matter of discretionary relief.

At the hearing held September 23, 1952, the respondent applied for suspension of deportation and in the alternative voluntary departure. In connection therewith, he executed Immigration Form I-265A executed before the deportation examiner then presiding on September 23, 1952 under oath. In this application form, the respondent related that his deportation would result in serious economic detriment to his citizen wife whom he married in San Francisco on March 28, 1950. He testified that he had not been previously married. At the conclusion of the proceedings, the respondent under order of September 24, 1952 was granted the discretionary relief of voluntary departure in lieu of deportation together with preexamination. A visa petition filed by the wife on behalf of the respondent was approved, and such approval was in due course transmitted to the American Consulate, Vancouver, B. C. The Consul under date of November 25, 1952 informed the respondent through his representative that whereas the preliminary application of the respondent stated that he had not been previously married, that the respondent was previously married to a German girl while a prisoner of war in Germany. In view of this information, the proceedings were ordered reopened.

At the reopened proceeding, the respondent presented a decree of annulment entered in the Civil and Penal Tribunal of Ancona, Italy on July 10, 1953 showing the termination of his marriage to one Elly

Martha Porg, such marriage having been contracted on September 4, 1945 in the City of Berlin, Germany. It is the contention of the respondent that he was tricked into marriage by the girl and her parents. This was done after the respondent had escaped from the prisoner of war camp in Germany in 1945, after which he was given shelter by the family of Elly Porg for approximately 15 days; that during this time he affixed his signature in the presence of a third party on a sheet of paper for the ostensible purpose of permitting the Porg family to obtain food rations and clothing since they were his host. He denied that he intended to contract matrimony and stated that the marriage had never been consummated.

The special inquiry officer who heard the testimony of the respondent and had an opportunity to observe his behaviour and demeanor has characterized the explanation given by the respondent in regard to his marriage to Elly Porg as incredible. He has concluded that the respondent was fully aware of his prior marriage and deliberately withheld such information from the immigration authorities for the purpose of obtaining discretionary relief. Upon consideration of the entire record and taking into account the arguments advanced by counsel in his brief, we come to the conclusion that the decision should not be disturbed. Accordingly, the appeal will be dismissed.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

/s/ Thos. G. Finucane
Chairman

Appendix D

July 28, 1953

Memorandum for attention of Special Inquiry Officer
P. R. McLaughlin and Docket Clerk
in the Inquiry Section

Re: Basilio Fugiani
V-944377

It is noted that at the conclusion of warrant proceedings before Special Inquiry Officer Robert S. DeMoulin on September 24, 1952, the following order was entered:

> "It is ordered that the respondent be permitted to depart voluntarily from the United States at his own expense within 120 days after this order.
>
> "It is further ordered that if the respondent fails to depart voluntarily from the United States within 120 days from the date of this order or any authorized extension thereof, that he be deported from the United States pursuant to law on the charge set forth in the Warrant of Arrest.
>
> "It is further ordered that preexamination be authorized, providing availed of prior to December 24, 1952."

In view of the fact that evidence has now been furnished to the Immigration and Naturalization Service indicating that the respondent's sworn statements as to his marital situation at the time of his application for discretionary relief granted at the above order were not in accordance with the true facts in his case and created a presumption at least that he may not

have been in all respects eligible for such relief, it appears that further proceedings are necessary to determine the respondent's eligibility for discretionary relief.

Since the special inquiry officer previously assigned to hold the hearing in this matter is not now immediately available, the case will be and is hereby reassigned to Special Inquiry Officer P. R. McLaughlin for such proceedings as may be required for the appropriate disposition of the case.

L. E. Gowen,
Acting Chief Inquiry Section